Honda Giken Kogyo Kabushiki Kaisha & Anor v Allied Pacific Motor (M) Sdn Bhd & Ors

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO MT1–22–392 OF 2004

NORAINI ABDUL RAHMAN JC

5 JANUARY 2009

Civil Procedure — Transfer of action — From one High Court to another — Part-heard action involving technical references, terms and comparisons — Whether should be heard to completion before same judge — Whether justice would be compromised if heard by new judge — Courts of Judicature Act 1964 ss 20, 23, 25

The plaintiffs had instituted an action against the defendants for infringement of registered industrial designs under the Industrial Design Act 1996 and infringement of copyright in the plaintiffs' motorcycles under the Copyright Act 1987. This civil suit was part-heard before YA Dato' Mariana bt Hj Yahya ('the judge') before the judge was transferred to the Kuantan High Court. The plaintiffs thereafter wrote to the Chief Judge of Malaya ('CJM') for the case to be continued to be heard by the judge but received the reply that their application 'tidak dapat dipertimbangkan'. The plaintiffs had therefore filed this application for an order to transfer this case to the Kuantan High Court for continued hearing before the judge. In support of their application the plaintiffs submitted that a lot of time and effort had been taken to explain all the technical references, terms and comparisons so that the judge could have a clearer understanding of the differences between the plaintiffs' and defendants' motorcycles and that the parties' cases will be compromised if another judge were to take over continued hearing of the trial at this point. Furthermore, the plaintiffs submitted that as all their three witnesses are from Japan much cost and time would be re-expended if these witnesses were required to attend court again to provide explanations on their previously given testimony. It was therefore the plaintiffs' contention that in the interests of justice the part-heard trial should be continued to be heard to completion before the judge.

Held, dismissing the application:

(1) The cases cited in support of the plaintiffs' application involved the

transfer of cases in which the trial proper had not begun. However, in the instant case the plaintiffs were applying to transfer a part-heard case (see para 7(a))

(2) Sections 23, 25 and para 12 of the Schedule to Courts of Judicature Act 1964 ('the Act') do not apply to cases of continued hearing (see para 7(b))

(3) Under s 20 of the Act only the CJM has the power to give directions as regards the distribution of business among judges of the High Court. In this case the CJM had decided that the plaintiff's application 'tidak dapat dipertimbangkan' (see para 7(c)).

[Bahasa Malaysia summary

Plaintif-plaintif memulakan tindakan terhadap defendan-defendan untuk pelanggaran reka bentuk perindustrian berdaftar di bawah Akta Reka Bentuk Perindustrian 1996 dan pelanggaran hak cipta dalam motosikal plaintif-plaintif di bawah Akta Hak Cipta 1987. Guaman sivil ini adalah didengar sebahagian oleh YA Dato' Mariana bt Hj Yahya ('hakim') sebelum hakim tersebut ditukar ke Mahkamah Tinggi Kuantan. Plaintif-plaintif kemudiannya menulis kepada Hakim Besar Malaya ('HBM') untuk kes tersebut disambung bicara oleh hakim tetapi menerima jawapan bahawa permohonan mereka tidak dapat dipertimbangkan. Plaintif-plaintif oleh itu memfailkan permohonan ini untuk satu perintah untuk memindahkan kes ini ke Mahkamah Tinggi Kuantan untuk disambung bicara di hadapan hakim. Untuk menyokong permohonan mereka plaintif-plaintif menghujah bahawa banyak masa dan usaha telah diambil untuk menjelaskan kesemua rujukan teknikal, terma-terma dan perbandingan supaya hakim boleh mendapat pemahaman yang lebih jelas mengenai perbezaan di antara motosikal-motosikal plaintif-plaintif dan defendan-defendan dan kes pihak-pihak akan terjejas jika hakim yang lain menggantikan sambung bicara perbicaraan pada ketika ini. Tambahan, plaintif-plaintif menghujah bahawa oleh sebab ketiga-tiga saksi mereka adalah dari Jepun banyak kos dan masa terpaksa dibelanjakan semula jika saksi-saksi ini diminta menghadiri mahkamah semula untuk memberikan penjelasan tentang keterangan mereka yang terdahulu. Oleh itu plaintif-plaintif menghujah bahawa demi kepentingan keadilan, perbicaraan yang dibicarakan sebahagian sewajarnya disambung bicara sehingga selesai di hadapan hakim.

Diputuskan, menolak permohonan:

(1) Kes-kes yang dinyatakan untuk menyokong permohonan plaintif-plaintif melibatkan pemindahan kes di mana perbicaraan

sebenar belum bermula. Walau bagaimanapun, di dalam kes ini plaintif-plaintif memohon untuk pemindahan kes yang dibicarakan sebahagian (lihat perenggan 7(a)).

(2) Seksyen-seksyen 23, 25 dan perenggan 12 Jadual kepada Akta Mahkamah Kehakiman 1964 ('Akta') tidak beraplikasi kepada kes-kes yang disambung bicara (lihat perenggan 7(b)).

(3) Di bawah s 20 Akta hanya HBM mempunyai kuasa untuk memberikan arahan berkaitan dengan pengagihan kerja di antara hakim-hakim Mahkamah Tinggi. Di dalam kes ini HBM telah memutuskan bahawa permohonan plaintif-plaintif tidak dapat dipertimbangkan (lihat perenggan 7(c)).]

Notes

For cases on transfer of action from one High Court to another, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 7795–7800.

Cases referred to

Pacific Centre Sdn Bhd v United Engineers (M) Bhd [1984] 2 MLJ 143, HC (refd)

Rashidah bt Mohammed v Mayban Finance Bhd [2003] 5 MLJ 529, HC (refd)

Tanah Sutera Development Sdn Bhd v Pentadbir Tanah Daerah Johor Bahru [2002] 2 MLJ 65, CA (refd)

Legislation referred to

Copyright Act 1987
Courts of Judicature Act 1964 ss 20, 23, 25, 25(2), Schedule, para 12
Industrial Designs Act 1996
Rules of the High Court 1980 O 92 r 4

Linda Wong (NY Chong with her) (Tay & Partners) for the plaintiff.
Chandrasegaran (Maxwell Kenion Cowdy & Jones) for the defendant.

Noraini Abdul Rahman JC:

[1] This is an application (encl 19) by the plaintiffs for an order that — this civil suit be transferred to Court 2, High Court Kuantan for continued hearing before YA Dato' Mariana bt Hj Yahya in accordance with ss 23, 25(2) and para 12 of Schedule, Courts of Judicature Act 1964 and O 92 r 4 of the Rules of the High Court 1980.

[2] In this case, the plaintiffs are suing the defendants for infringement of registered industrial designs under the Industrial Designs Act 1996 and infringement of copyright of the plaintiffs' motorcycles under the Copyright Act 1987.

[3] The plaintiff's had three witnesses. The trial is at advance stage ie PW3 will be reexamined after which the plaintiff's will close its case. Two other witnesses (PW1 and PW2) had given evidence. All three witnesses are from Japan.

[4] Chronology of event:

(a) YA Dato' Mariana bt Hj Yahya heard civil suit MT1–22–392–2004 on the following dates:

24–26 October 2007;

23–30 June 2008;

1–4 July 20087; and

8 August 2008.

(b) 1 October 2008 — YA Dato' Mariana bt Hj Yahya was transferred to Kuantan High Court.

(c) 6 October 2008 — Letter from Chief Judge of Malaya's office whereby YA Dato' Mariana need not continue with the part heard case.

(d) 9 October 2008 — The plaintiffs counsel, Messrs Tay & Partners wrote to the then CJM for case to be continued by YA Dato' Mariana.

(e) 12 November 2008 — Reply from the officer of CJM to Messrs Tay & Partners that the application 'tidak dapat dipertimbangkan'.

(f) 21 November 2008 — The plaintiffs filed summons in chambers to transfer that case to Kuantan High Court for continued hearing before YA Dato' Mariana.

[5] Submission by the plaintiffs' counsel:

(a) That YA Dato' Mariana had heard the case on various dates as in para 4(a) above.

(b) That both parties agree that the case be transferred to Kuantan High Court for continued hearing by YA Dato' Mariana.

(c) That causes of action in this case are infringement of registered industrial designs under the Industrial Designs Act 1996 and infringement of copyright in the plaintiffs' motorcycles under the Copyright Act 1987.

(d) That a lot of time and effort was taken to explain to YA Dato' Mariana,

the technical references, technical terms so that there be a clear understanding as to which part exactly of the motorcycle is referred to. Examples of those references or terms are — front bender, handle cover, front forks, centre pipe cover, air outlet aperture, side pipe cover, louvre and many others. Counsel submits that statements and evidence given using these terms will be difficult to understand without explanations or illustrations.

(e) That the trial decision of the court without a full understanding and appreciation of the witness's evidence and answers given in examination puts the parties case at serious risk of being affected and prejudiced.

(f) That much of the evidence and explanations have not been recorded as part of the notes of proceedings including:

(i) drawings made by the witnesses as explanation to YA Dato' Mariana, for example, of concepts such as 'slim', 'sleek', 'trendy' and 'aerodynamic' and how this is encapsulated in a design of a motorcycle;

(ii) detailed and technical comparison between the plaintiff' and defendants' motorcycle by way of reference and pointing to the physical motorcycle and their parts in court; and

(iii) the facial expressions and body language of witnesses when giving evidence.

(g) Both parties' cases will therefore be compromised as a substantial portion of the evidence crucial to having a full understanding of both parties' cases may be lost if another judge takes over continued hearing of the trial.

(h) All the plaintiffs' witness ie three are from Japan. PW2 is Honda's chief designer for motorcycle section and PW3 is the assistant chief designer.

(i) As the plaintiffs' witnesses are from Japan, much costs and time will need to be re-expended if these witnesses are required to attend court to provide explanations on their testimony previously given. All the plaintiffs' witness ie three are from Japan. PW2 is Honda's chief designer for six motorcycle section and PW3 is the assistant chief designer.

(ii) There will also be additional costs having to be re-incurred in the form of traveling and service charges of a Japanese-English interpreter whose presence and services are required to assist the plaintiffs' witnesses to give evidence.

(i) That the trial is at advanced stage.

(i) The plaintiffs' case will be closed after the current witness, PW3. The plaintiffs' reexamination of PW3 is not expected to be long.

(ii) The defendants have indicated that they have only two witnesses, who are not long witnesses.

(j) That by reason of all the aforesaid and the particular circumstances of the present case, the parties are of the common position that the interests of justice require that the part heard trial be continued to be heard to completion by YA Dato' Mariana.

(k) That if the transfer application is not allowed, the unsuccessful party at trial will inevitably have strong suspicions and doubts that its case and evidence given at trial were not fully appreciated and understood by the court. This increase the chances of the unsuccessful party appealing against the trial decision, hence, further increasing time and costs for both parties. It is to avoid such an outcome and to minimise from the outset, the unsuccessful party having such negative suspicions and doubts that the parties take the common position that the transfer application is necessary and ought to be granted.

[6] In order to substantiate the application for the transfer of the case to be heard by YA Dato' Mariana, counsel submitted cases and statutes on transfers as follows:

(i) *Rashidah bt Mohammed v Mayban Finance Bhd* [2003] 5 MLJ 529;

(ii) *Tanah Sutera Development Sdn Bhd v Pentadbir Tanah Daerah Johor Bahru* [2002] 2 MLJ 65;

(iii) *Pacific Centre Sdn Bhd v United Engineers (M) Bhd* [1984] 2 MLJ 143, at 147 (TAB-4 PBA);

(vi) Section 23 of the Courts of Judicature Act 1964; and

(v) Section 25(2) and para 12 of the Courts of Judicature Act 1964.

[7] I had dismissed the application on the following grounds:

(a) That the cases cited by counsel for the plaintiffs are as regards transfers of those cases. In the case of *Tanah Sutera Development Sdn Bhd v Pentadbir Tanah Daerah Johor Bahru*, the Court of Appeal had no jurisdiction to hear the appeal. Hence, it transferred the case to the Federal Court. In the cases transferred, the court transferring the case had not heard the case proper ie the trial proper had not begun. In contrast, although the application before me is to transfer the case, in actual fact, it is a part heard case that they are seeking to transfer.

(b) That ss 23, 25 and para 12 of the Schedule to Courts of Judicature

Act 1964 do not apply to cases of continued hearing. Section 23 provides that a High Court shall have jurisdiction to try all civil proceeding 'where all parties consent in writing within the local jurisdiction of the other High Court'. In this case, the plaintiffs'registered address is at No 1–1, 2-Chome, Minamiaoyama, Minato-Ku-Tokyo. The first defendant has its registered office at 243B, Taman Melaka Raya, 75000 Melaka and a business address at Lot 9641 Taman Desa Aman, Batu 11, Sungai Buloh, Selangor. The second defendant has its registered address at 804, 6th floor, Lee Yan Lian Building, Taman Desa Aman, Batu 11, Sungai Buloh, Selangor.

(c) That under s 20 of the Courts of Judicature Act 1964, only the Chief Judge has the power to give directions as regards the distribution of business among judges of the High Court. In this case, the then Chief Judge of Malaya had made a decision by letter dated 12 November 2008 addressed to Messrs Tay and Partners that 'Permohonan tuan agar kes tersebut di atas disambung bicara oleh YA Dato' Mariana bt Yahya tidak dapat dipertimbangkan'. The Chief Judge of Malaya must have acted under s 20.

Application dismissed.

Reported by K Nesan